Conversent Communications

VIA OVERNIGHT & ELECTRONIC MAIL

August 31, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: Petition of Verizon New England Inc. for Arbitration of an Amendment To Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*, D.T.E. 04-33

Dear Ms. Cottrell:

Enclosed for filing are Conversent's Comments on the Effect of the FCC Interim Rules Order. Please contact me if you have any questions. Thank you.

Very truly yours,

Gregory M Kennan

Gregory M. Kennan
Director of Regulatory Affairs & Counsel
Conversent Communications of
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GMK/cw

Enclosure

cc: Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment To Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	**D.T.E. 04-33**

CONVERSENT'S COMMENTS ON THE EFFECT OF THE FCC INTERIM RULES ORDER

Conversent Communications of Massachusetts, LLC ("Conversent") believes that the FCC's *Interim Rules Order*[1] has the following principal effects upon this proceeding:

1. The *Interim Rules Order* confirmed that *USTA II*[2] did not eliminate Verizon's obligation to provide unbundled DS1, DS3, and dark fiber high-capacity loops at TELRIC prices.

2. The *Interim Rules Order* requires Verizon to continue to provide DS1, DS3 and dark fiber high capacity loops and DS1, DS3, and dark fiber dedicated transport for a period of six months or until the FCC issues new unbundling rules for these elements.

3. Nothwithstanding the *Interim Rules Order,* the Department should proceed to issue a standstill order, or otherwise act pursuant to state law in this docket or in D.T.E. 03-60, to require Verizon to continue offering DS1, DS3 and dark fiber loops and DS1, DS3, and dark fiber dedicated transport at TELRIC rates unless and until the FCC issues rules specifically superseding such state requirements. Verizon and others have sought a writ of mandamus before the D.C. Circuit to invalidate the FCC's interim unbundling rules. Department action is necessary to preserve competition and promote the public interest.

4. The Department should rule that Verizon has an obligation to perform routine network modifications, without requiring amendment of interconnections agreements and without additional charges, as part of its obligation to provision unbundled high-capacity loops and other network elements.

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[1] *In the Matter of Unbundled Access to Network Elements,* WC Docket No. 04-33, Order and Notice of Proposed Rulemaking, FCC 04-179 (August 20, 2004) ("*Interim Rules Order*").

[2] *United States Telecom Association v. FCC,* 359 F. 3d 554 (D.C. Cir. 2004) ("*USTA II"*).

Discussion

I. The *USTA II* Remand Does Not Affect High-Capacity Loops.

The Department should dismiss, as a matter of law, any claim by Verizon that it is not obligated to provide access to unbundled DS1, DS3, and drk fiber high-capacity loops at TELRIC rates. Verizon has argued in elsewhere (*e.g.,* in D.T.E. 03-60) that *USTA II* invalidated the unbundling requirements for DS1, DS3, and dark fiber high-capacity loops. That is incorrect. The *USTA II* opinion simply does not address high-capacity loops. Thus the Court's opinion and June 16th mandate[3] does not obviate Veizon's legal obligation to provide such loops.

In the *Interim Rules Order,* the FCC agreed: "The D.C. Circuit did not make a formal pronouncement regarding the status of the Commission's findings regarding enterprise market loops." *Interim Rules Order,* ¶ 1 n. 4. "[N]owhere does the court state that our rules requiring the unbundling of high capacity loop facilities are vacated." *Id.,* Dissenting Statement of Commissioner Michael J. Copps.

The FCC's statements should put the matter to rest. Conversent anticipates, however, that Verizon will continue to argue here that *USTA II* eliminated the unbundling requirement for high-capacity loops. Verizon's argument, as set forth in D.T.E 03-60, is built upon an out-of-context extrapolation of one imprecise parenthetical reference in the Court's opinion. It seizes upon that reference and stretches it far beyond its intended meaning.

The sentence containing the parenthetical reference is as follows:

> The Commission has made multiple impairment findings with respect to dedicated transport elements (transmission facilities dedicated to a single customer or carrier), varying the findings by capacity level.

[3] The mandate entered judgment "in accordance with the opinion of the court."

USTA II, 359 F.3d at 573. Verizon claims that the Court's use of the terms "transmission" and "customer" makes the Court's discussion concerning dedicated transport also applicable to loops. Verizon apparently believes that the Court has fashioned a new definition of facility — "transmission facility" — that includes both loops and dedicated transport. Verizon Massachusetts' Reply to Briefing Questions, D.T.E. 03-60, July 30, 2004, at 4 n. 4.

Verizon's interpretation is a clear case of the minnow swallowing the whale. The word "transmission" does not appear again in the Court's discussion of dedicated transport (Part II.B.1 - B.2.a, pp. 573-75). The term "dedicated transport" or "transport" however, appears more than 15 times.

Furthermore, in the discussion of dedicated transport, the Court cites multiple paragraphs of the TRO.[4] All but one of those citations refers to a paragraph in that portion of the TRO discussing dedicated transport (¶¶ 359-418).[5] Not a single one of the Court's citations is in the *TRO*'s discussion of loops (¶¶ 197-342).

The Court's summary of its rulings also shows that loops simply were not included. The Court said:

> To summarize: we vacate the Commission's sub-delegation to state commissions of decision-making authority impairment determinations, which in the context of this Order applies to the sub-delegation scheme established for mass-market switching and certain dedicated transport elements (DS-1, DS-3 and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements.

USTA II, 359 F.3d at 594. Loops are not mentioned.

In addition, the D.C. Circuit affirmed the FCC's unbundling decision with respect to fiber/copper hybrid loops. *Id.* at 578-83. Part of the FCC's decision was to require ILECs to

[4] Specifically, ¶¶ 359, 372, and 381-93 on p. 573; ¶¶ 398, 399-401, 405-09, 400, 412-16, 410, 411, 394, 360, 401, and 409 on p. 574; ¶ 401 on p. 575.

continue unbundling the time-division multiplexing (TDM) capabilities of hybrid loops so as to allow CLECs to provide DS1 and DS3 paths over hybrid loops. *TRO* ¶ 289. The D.C. Circuit unquestionably was aware of the unbundling requirement for the DS1 and DS3 TDM capabilities; the Court cites ¶ 289 in its opinion. 359 F.3d at 578. It would make no sense for the Court to invalidate the unbundling requirements for DS1 and DS3 loops while affirming the FCC's mandate to continue to unbundle the DS1 and DS3 capabilities of hybrid loops. Thus, the D.C. Circuit's affirmance of the hybrid loop rules shows its intent that DS1 and DS3 loops continue to be unbundled.

There also is nothing to suggest that the Court intended to craft a new category of unbundled network element, the "transmission" element. It is not the Court's prerogative to establish the categories of network elements that must be unbundled. While the Court certainly has the responsibility to review FCC rules, it would be an improper invasion of administrative agency responsibility for the Court to establish such a category in the first instance. To be sure, if the Court intended to create a new category of UNE, it would have offered more explanation than a single parenthetical reference.

In fact, the opposite is true. The D.C. Circuit was very aware that "transport" includes only facilities between ILEC switches. In discussing the FCC's exclusion of entrance facilities from the definition of "dedicated transport," the Court wrote:

> Before the Order, the Commission had defined "dedicated transport facilities" as including entrance facilities. But in the Order it concluded that this definition was "overly broad," Order ¶ 365, and found that "a more reasonable and narrowly-tailored definition of the dedicated transport network element includes only those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches," *id.* ¶ 366.

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[5] The remaining footnote is to the FCC's general impairment analysis, ¶¶ 84 *et seq.* 359 F.3d at 575.

USTA II, 359 F. 3d at 585 (emphasis in original). Based on this clear statement, it cannot be the case that the Court believed that transport and loops were part of the same "transmission" category.

Even if the Court's invalidation of the sub-delegation scheme did apply by extension to high-capacity loops, the Court did not invalidate the nationwide impairment findings with respect to high-capacity loops as it did with dedicated transport and mass-market switching. Therefore, the most that can be said is that the Court invalidated the sub-delegation of responsibility to the states to find *exceptions* to the national impairment finding for high-capacity loops. The nationwide impairment finding itself stands. As the Court stated, "the petitions for review are otherwise denied." *USTA II,* 359 F. 3d at 594.

Accordingly, the Department should reject, as a matter of law, any Verizon claim that it no longer is obligated to provide unbundled DS1, DS3m, and dark fiber loops at TELRIC rates.

II. The *Interim Rules Order* Requires Verizon to Continue to Provide High-Capacity Loops and Dedicated Interoffice Transport at the Rates, Terms, and Conditions in Existing Interconnection Agreements and its Wholesale Tariff.

The Interim Rules Order requires Verizon to continue to provide unbundled DS1, DS3, and dark fiber loops[6] and DS1, DS3, and dark fiber dedicated transport at the rates, terms, and conditions in interconnection agreements, state tariffs, and Statements of Generally Available Terms (SGATs) as of June 15, 2004. *Interim Rules Order,* ¶¶ 1, 16, 21. It is important to note that while the FCC refers to "interconnection agreements" existing on June 15th, that term specifically includes state tariffs and SGATs. "Throughout this Notice and Order, references to an incumbent LEC's obligations under its interconnection agreements apply also to obligations

[6] As noted above, the FCC confirmed that *USTA II* did not eliminated ILECs' obligations to unbundled high-capacity loops. Because certain parties have made that claim, however, the FCC assumed *arguendo* that they were correct and included high-capacity loops in its interim unbundling rules. *Interim Rules Order,* ¶ 1 n. 4.

set forth in the incumbent LEC's applicable statements of generally available terms (SGATs) and relevant state tariffs." *Id.,* ¶ 1 n. 5.

These obligations will remain in place for approximately six months:

> These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.

Id. ¶ 1.

Thus, to the extent that Verizon seeks to discontinue unbundling high-capacity loops or dedicated transport, the *Interim Rules Order* forbids it from so doing for six months from publication of the Order in the Federal Register (which has not yet occurred). Any claim by Verizon that it may discontinue unbundling high-capacity loops and dedicated transport should be rejected as a matter of law.

III. Notwithstanding the Interim Rules Order, the Department Should Require Verizon to Continue Unbundling High-Capacity Loops and Dedicated Transport Under State Authority Until the FCC Expressly Supersedes Such Requirements.

Notwithstanding the *Interim Rules Order,* the Department should take prompt action either in this docket or in D.T.E. 03-60 to issue a "standstill" order, as requested by several parties, requiring Verizon to continue to provide unbundled network elements — specifically, unbundled DS1, DS3, and dark fiber high-capacity loops and unbundled DS1, DS3, and dark fiber dedicated transport — at TELRIC rates until the FCC issues final unbundling rules that expressly supersede such a state requirement.

Verizon and several other parties have filed a petition for a writ of mandamus before the D.C. Circuit. The petition seeks to invalidate the FCC's interim rules. Although Conversent is informed that a briefing schedule has not been set, it is likely that the Court will act expeditiously on the petition.

The FCC's interim rules could be invalidated as the result of this challenge. If they are, the Department and parties will find themselves in the same uncertain position as they were before the FCC issued the interim rules. Therefore, the Department should not refrain from acting upon the various motions seeking "standstill" orders on the ground that the FCC's interim rules have addressed the problem.

As Conversent has previously suggested in this docket and in D.T.E. 03-60, the Department would be justified under state law in requiring Verizon to continue to provide high-capacity DS-1, DS-3, and dark fiber loops and dedicated transport (including DS-1, DS-3 and dark fiber transport) at TELRIC rates until the FCC expressly supersedes the Department's requirement.[7] To do so will preserve the likely outcome at the federal level,[8] and would lessen disruption of the telecommunications markets and the financial well-being of competitors and consumers.[9] The Department should act to the fullest extent of its authority to promote the policy of competition that the Department historically has fostered.

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[7] Conversent's Response to Verizon's Motion to Hold Proceeding In Abeyance, D.T.E. 04-33, May 11, 2004, at 2-6; Conversent's Comments in Response to June 15 Order, D.T.E. 03-60, July 29, 2004, at 4-12.

[8] "In the *Triennial Review Order*, I supported fully requiring incumbents to unbundle DS1 loops and transport, as did every one of my colleagues." *Interim Rules Order,* Statement of Chairman Michael K. Powell. "Indeed, it bears emphasis that a clear majority of the Commission has advocated the continued unbundling of DS-1 facilities in most circumstances and has also called for issuing new unbundling rules well before the interim period ends. If we fulfill our responsibilities, as I am confident will be the case, then there will be no price increases for any DS-1 loops or transport facilities that are designated as UNEs; rather, TELRIC rates would continue to apply as they do today." *Id.,* Statement of Commissioner Kathleen Q. Abernathy. "The Commission was unanimous in upholding unbundled access to DS-1 transmission facilities in the original Triennial Review Order, and nowhere does the court state that our rules requiring the unbundling of high capacity loop facilities are vacated." *Id.,* Dissenting Statement of Commissioner Michael J. Copps.

[9] Conversent's Comments in Response to June 15 Order, D.T.E. 03-60, July 29, 2004, at 12-18.

IV. The Department Should Require Verizon to Perform Routine Network Modifications at Current UNE Prices without Amending Interconnection Agreements or the Wholesale Tariff.

An issue that remains outstanding in this arbitration and that is unaffected by the *Interim Rules Order* is that of Verizon's obligation to perform routine network modifications in connection with provisioning DS1 loops and other UNEs. Verizon has proposed an amendment to its interconnection agreement providing for routine network modifications, and has proposed substantial new charges of at least $1,000 to perform routine network modifications for a DS1 loop.[10]

Neither the proposed amendment nor the high proposed fees are appropriate. In the *TRO,* the FCC rejected Verizon's "no facilities" policy, which formed the basis of the dispute leading to the FCC's clarification concerning routine network modifications. The Verizon policy cited in the *TRO* was itself a change that Verizon unilaterally imposed on Conversent and other CLECs in approximately May of 2001; prior to that time, Verizon typically performed routine modifications when provisioning DS-1 loops. *In re Verizon Maine: Petition for Consolidated Arbitration,* Docket No. 2004-135, Order at 7-8 (Maine P.U.C. June 11, 2004) (*"Maine Order"*).

In addition, the FCC found that Verizon performed far less extensive routine modifications in connection with UNE loop orders than other major ILECs. *TRO* ¶ 639 n. 1936. The FCC's finding "that attaching routine electronics, such as multiplexers, apparatus cases, and doublers to high-capacity loops is already standard practice in most areas of the country" (*TRO* ¶ 635) shows that Verizon's policy did not reflect the view of pre-*TRO* law that prevailed throughout the rest of the country. Thus, in the *TRO*, the FCC merely affirmed Verizon's

[10] Verizon's proposed Amendment to Interconnection Agreement (Exhibit 2 to Verizon's Petition for Arbitration), § 3.7.1 and Pricing Attachment.

obligations to provision DS-1 UNE loops where certain routine network modifications are required.

In other words, the FCC did not change the law, but clarified Verizon's obligations under existing law. This being the case, the "change in law" provisions in Verizon's interconnection agreements are not invoked, and no further negotiation or amendment is necessary for Verizon to comply with its legal obligation to provide routine network modifications as part and parcel of a DS-1 UNE loop.

The Maine Commission confirmed this interpretation. It ruled:

> We find, on balance, that the *TRO* did not establish new law but instead clarified existing obligations. Section 251(c)(3) has always required that Verizon provide access to its UNEs on a non-discriminatory basis. The FCC's new rules merely clarify what is required under that existing obligation. Thus, Verizon must perform routine network modifications on behalf of CLECs in conformance with the FCC's rules. Verizon may not condition its performance of routine network modifications on amendment of a CLEC's interconnection agreement.

Maine Order at 8. Likewise, in dismissing any "routine network modification" language from Verizon's proposed TRO amendment, the Rhode Island Arbitrator agreed that the FCC did not establish rules that departed in any way from prior rules, but merely "resolved the controversy as to whether VZ-RI had to perform routine network modifications." *In re: Petition of Verizon-Rhode Island For Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Rhode Island to Implement the Triennial Review Order,* Docket No. 3588, Procedural Arbitration Decision at 11 (April 9, 2004) ("*RI Decision*"). Similarly, the Virginia State Corporation Commission ruled that the TRO established Verizon's obligations regarding routine network modifications in connection with the provisioning of DS-1 UNE loops, and required that Verizon perform such modifications under existing interconnection agreements without modification. *In re Petition of*

Cavalier Telephone for Injunction against Verizon Virginia for Violations of Interconnection Agreement and for Expedited Relief to Order Verizon Virginia to Provision Unbundled Network Elements in Accordance with the Telecommunications Act of 1996, Case No. PUC-2002-00088, Final Order at 8-9 (Va. SCC, Jan. 28, 2004).[11]

In addition, there is no justification for Verizon to refuse to perform such routine network modifications unless and until CLECs agree to pay substantial new charges for such work. Verizon in all likelihood is already compensated for such work as part of its Department-approved rates for DS-1 UNE loops. In the *TRO*, the FCC noted that "the costs associated with these modifications often are reflected in the recurring rates that competitive LECs pay for loops." *TRO* ¶ 640. The Maine Commission and Rhode Island Arbitrator made the same observation in their respective arbitration proceedings. *Maine Order* at 8-9; *RI Decision* at 12.

If Verizon believes that its current TELRIC rates do not compensate it for the costs of these routine modifications, then it should petition for — and show the appropriateness of — rate adjustments. It is improper, however, for Verizon to unilaterally impose additional charges that the Department has not approved. Accordingly, the Department should require Verizon to perform routine network modifications as set forth in the *TRO* when provisioning high-capacity UNE loops, without any amendment to interconnection agreements or increases in rates.

Conclusion

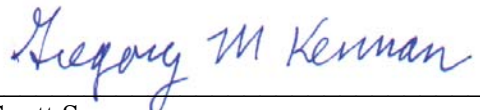
The Department should require Verizon to continue providing unbundled DS1, DS3, and dark fiber high capacity loops and DS1, DS3, and dark fiber dedicated transport at TELRIC rates under Verizon's Tariff No. 17 as described above. In addition, the Department should require Verizon to make necessary routine network modifications when provisioning DS-1 UNE loops

[11] http://www.state.va.us/scc/caseinfo/puc/case/c020088d.pdf.

and other network elements, without any need to amend existing interconnection agreements and without any additional charges.

August 31, 2004

Respectfully Submitted,



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